



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

March 23, 2006

The Honorable Sheila Roberge, Chair
Senate Public and Municipal Affairs Committee
State House 103
Concord, NH 03301

Re: HB 626, relative to the right-to-know law

Dear Senator Roberge and Members of the Committee:

Thank you for the opportunity to comment on HB 626, relative to the Right-to-Know Law. The Department of Environmental Services supports efforts to amend RSA 91-A to reflect current information technology, but has serious concerns about one aspect of the bill. Specifically, the Department is concerned that by defining "public body" to include "any state agency ... and any committee, advisory or otherwise, established by such entit[y]," the bill will substantially interfere with the operating efficiency of state agencies by extending the requirements for public notice, public access, and minute-keeping to many agency activities that are not currently covered, and at a cost that has not been considered.

Under current law, the transaction of governmental functions by "any board or commission of any state agency" is defined to be a "public proceeding" subject to the Right-to-Know Law, but state agencies and their non-statutory working committees have not been considered to be "public bodies" that hold "meetings" subject to public notice and minute-keeping requirements.

Like many state agencies, the Department of Environmental Services does much of its work through formal and informal groups of employees that are variously called committees, boards and teams. These committees are often the first step in agency consideration of environmental issues or policies that result in a recommendation for action to the Commissioner. For instance, the Commissioner and senior managers meet as a committee called the Senior Leadership Team every Monday morning to discuss management, policy and legislative issues expected to arise that week. As currently drafted, HB 626 would prevent the Commissioner from meeting with senior managers as a group without providing public notice, allowing public access the meeting, and maintaining minutes of the meeting. The Department also routinely establishes hiring committees to interview candidates for vacant positions. Under HB 626 in its current form, agency hiring committees would have to provide advance notice of their meetings and then convene and enter a nonpublic session under the personnel exclusion of RSA 91-A:3, II. Other examples of DES committees include the Water Quality Standards Committee, Education and Outreach Committee, Information Technology Steering Committee and Rewards and Recognition Committee.

The Fiscal Note provided for the bill did not identify significant state government costs. However, the Department believes that if it has to provide public notice and maintain minutes of all of its committee meetings, then over time substantial costs would be incurred.

P.O. Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095
Telephone: (603) 271-3503 • Fax: (603) 271-2867 • TDD Access: Relay NH 1-800-735-2964
DES Web site: www.des.nh.gov

While we believe strongly that government agencies should be as transparent as possible, we do not believe that the public is well-served by creating unnecessary hurdles to efficient agency operations. Many agency committee meetings relate to either internal operations or pre-planning consideration of public policy issues that result in agency recommendations that presented at meetings of legally established decision making bodies that are properly subject to public notice and minute-keeping requirements. The public interest will not be advanced by enactment of an overly broad requirement that all agency committee meetings be publicized and recorded.

The Department believes that these concerns would be addressed if the bill is amended to require the meeting notice, public access and minutes requirements apply only to meetings held by those public bodies that are required by law to act through "joint authority" (i.e., majority vote), as defined in RSA 21:15. This would effectively require legally established boards, commissions and committees to comply with the notice, public access and minute-keeping requirements of RSA 91-A, but would exempt informal or internal agency committees that do not conduct decision-making meetings. The language of a proposed amendment to accomplish this important change is attached for your consideration.

Thank you for the opportunity to comment. If you have any questions, please contact Michael Walls, Assistant Commissioner, at 271-8806 or by e-mail at mwalls@des.state.nh.us.

Sincerely,


for Michael P. Nolin
Commissioner

cc: Representative Thomas
Representative Cady
Representative Patten
Senator Barnes
Attorney General Ayotte

(changes to House version shown as follows: added language is in underlined bold italics
deleted language is ~~bracketed and double struck through~~)

4 Meetings; Nonpublic Sessions; Minutes and Records; Exemptions. Amend RSA 91-A:2-5 to read as follows:

91-A:2 Meetings Open to Public.

I. For the purpose of this ~~[section]~~ **chapter**, a "meeting" ~~[shall mean]~~ ***means*** the convening of a quorum of the membership of a public body ***that is required by law to act through joint authority, as [provided] defined in RSA 21:15 [91-A:1-a,]*** ~~[to discuss or act]~~ ***whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, for the purpose of discussing or acting*** upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power. ***A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. However, if any such matters are discussed among a quorum of the body, the discussion shall be disclosed at the next meeting of the body.*** "Meeting" shall ***also*** not include:

...

91-A:3 Nonpublic Sessions.

I.(a) ~~A p[**P**]~~***public body*** ~~[bodies] [or agencies]~~ ***that is required by law to act through joint authority, as defined in RSA 21:15*** shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No ***public body*** ~~[or agency]~~ ***that is required by law to act through joint authority, as defined in RSA 21:15*** may enter nonpublic session, except pursuant to a motion properly made and seconded.

...

91-A:4 Minutes and Records Available for Public Inspection.

I. Every citizen during the regular or business hours of all ~~[such]~~ ***public*** bodies ~~[or agencies]~~, and on the regular business premises of such ***public*** bodies ~~[or agencies]~~, has the right to inspect all ~~[public]~~ ***governmental*** records ***in the possession, custody or control of such public bodies***, including minutes of meetings of ~~[the]~~ ***those public bodies*** ~~[or agencies]~~ ***that are required by law to act through joint authority as defined in RSA 21:15***, and to ***copy and*** make memoranda~~[,]~~ ***or*** abstracts~~[,] and photographic or photostatic copies]~~ of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. ***In this section, "to copy" means the reproduction of original records by whatever method***

(changes to House version shown as follows: added language is in underlined bold italics
deleted language is ~~bracketed and double struck through~~)

including, but not limited to, photography, photostatic copying, printing, or electronic or tape recording.

...

II. After the completion of a meeting of ~~[such]~~ **a public** ~~[bodies]~~ **body** ~~[or agencies]~~
that is required by law to act through joint authority as defined in RSA
21:15, every citizen, during the regular or business hours of ~~[all]~~ such **public**
~~[bodies]~~ **body** ~~[or agencies]~~, and on the regular business premises of such **public**
~~[bodies]~~ **body** ~~[or agencies]~~, has the right to inspect all notes, materials, tapes or
other sources used for compiling the minutes of such meetings, and to make
memoranda, abstracts, ~~[photographic or photostatic copies, or tape record]~~ **or to**
copy such notes, materials, tapes or sources inspected, except as otherwise
prohibited by statute or RSA 91-A:5.

...

[no change to remainder of section 4]

5 Remedies. Amend RSA 91-A:8 to read as follows:

91-A:8 Remedies.

I. If any **public** body ~~[or agency]~~ or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a ~~[public]~~ **governmental** record or refuses access to a ~~[public]~~ ~~[governmental proceeding]~~ **meeting** to a person who reasonably requests the same, such **public** body ~~[or agency]~~ or person shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available or the ~~[proceeding]~~ **meeting** open to the public. Fees shall not be awarded unless the court finds that the **public** body ~~[or agency]~~ or person knew or should have known that the conduct engaged in was a violation of this chapter or where the parties, by agreement, provide that no such fees shall be paid. In any case where fees are awarded under this chapter, upon a finding that an officer, employee, or other official of a public body ~~[or agency]~~ has acted in bad faith in refusing to allow access to a ~~[public]~~ ~~[governmental proceeding]~~ **meeting** or to provide a ~~[public]~~ **governmental** record, the court may award such fees personally against such officer, employee, or other official.